## Senate, No. 2078

[Senate, June 8, 2009 – New draft from the committee on The Judiciary on Senate, No. 1783]

## The Commonwealth of Massachusetts

In	the	Year	Two	Thousand	and	Nine

AN ACT PROVIDING FOR THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- SECTION 1. The general laws, as appearing in the 2006 official edition, are hereby
- 2 amended by striking out chapter 180A and replacing it with the following section: -
- 3 Chapter 180A: Uniform Prudent Management of Institutional Funds
- 4 Section 1. Definitions.
- 5 The following words as used in this chapter shall have the following meanings unless a
- 6 different meaning is clearly apparent from the language or context: -
- 7 (1) "Charitable purpose" means the relief of poverty, the advancement of education or
- 8 religion, the promotion of health, the promotion of a governmental purpose, or any other purpose
- 9 the achievement of which is beneficial to the community.

10	(2) "Endowment fund" means an institutional fund or part thereof that, under the terms of
11	a gift instrument, is not wholly expendable by the institution on a current basis. The term does
12	not include assets that an institution designates as an endowment fund for its own use.
13	(3) "Gift instrument" means a record or records, including an institutional solicitation,
14	under which property is granted to, transferred to, or held by an institution as an institutional
15	fund.
16	(4) "Institution" means:
17	(A) a person, other than an individual, organized and operated exclusively for
18	charitable purposes;
19	(B) a government or governmental subdivision, agency, or instrumentality, to the
20	extent that it holds funds exclusively for a charitable purpose; or
21	(C) a trust that had both charitable and noncharitable interests, after all
22	noncharitable interests have terminated.
23	(5) "Institutional fund" means a fund held by an institution exclusively for charitable
24	purposes or a fund held by trustee for a charitable community trust.
25	The term does not include:
26	(A) program-related assets;
27	(B) a fund held for an institution by a trustee that is not an institution, other than a
28	fund which is held for a charitable community trust; or

29	(C) a fund in which a beneficiary that is not an institution has an interest, other
30	than an interest that could arise upon violation or failure of the purposes of the fund.
31	(6) "Person" means an individual, corporation, business trust, estate, trust, partnership,
32	limited liability company, association, joint venture, public corporation, government or
33	governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.
34	(7) "Program-related asset" means an asset held by an institution primarily to accomplish
35	a charitable purpose of the institution and not primarily for investment.
36	(8) "Record" means information that is inscribed on a tangible medium or that is stored in
37	an electronic or other medium and is retrievable in perceivable form.
38	Section 2. Standard of conduct in managing and investing institutional fund.
39	(A) Subject to the intent of a donor expressed in a gift instrument, an institution, in
40	managing and investing an institutional fund, shall consider the charitable purposes of the
41	institution and the purposes of the institutional fund.
42	(B) In addition to complying with the duty of loyalty imposed by law other than this
43	chapter, each person responsible for managing and investing an institutional fund shall manage
44	and invest the fund in good faith and with the care an ordinarily prudent person in a like position
45	would exercise under similar circumstances.
46	(C) In managing and investing an institutional fund, an institution:
47	(1) may incur only costs that are appropriate and reasonable in relation to the
48	assets, the purposes of the institution, and the skills available to the institution;

49	(2) except as otherwise provided by a gift instrument, shall allocate those costs on
50	a reasonable basis to each institutional fund prior to any appropriation; and
51	(3) shall make a reasonable effort to verify facts relevant to the management and
52	investment of the fund.
53	(D) An institution may pool two or more institutional funds for purposes of management
54	and investment.
55	(E) Except as otherwise provided by a gift instrument, the following rules apply:
56	(1) In managing and investing an institutional fund, the following factors, if
57	relevant, must be considered:
58	(a) general economic conditions;
59	(b) the possible effect of inflation or deflation;
60	(c) the expected tax consequences, if any, of investment decisions or
61	strategies;
62	(d) the role that each investment or course of action plays within the
63	overall investment portfolio of the fund;
64	(e) the expected total return from income and the appreciation of
65	investments;
66	(f) other resources of the institution;

67	(g) the needs of the institution and the fund to make distributions and to
68	preserve capital; and
69	(h) an asset's special relationship or special value, if any, to the charitable
70	purposes of the institution.
71	(2) Management and investment decisions about an individual asset must be made
72	not in isolation but rather in the context of the institutional fund's portfolio of
73	investments as a whole and as a part of an overall investment strategy having risk and
74	return objectives reasonably suited to the fund and to the institution.
75	(3) Except as otherwise provided by law other than this chapter, an institution
76	may invest in any kind of property or type of investment consistent with this section.
77	(4) An institution shall diversify the investments of an institutional fund unless the
78	institution reasonably determines that, because of special circumstances, the purposes of
79	the fund are better served without diversification.
80	(5) Within a reasonable time after receiving property, an institution shall make
81	and carry out decisions concerning the retention or disposition of the property or to
82	rebalance a portfolio, in order to bring the institutional fund into compliance with the
83	purposes, terms, and distribution requirements of the institution as necessary to meet
84	other circumstances of the institution and the requirements of this chapter.
85	(6) A person that has special skills or expertise, or is selected in reliance upon the
86	person's representation that the person has special skills or expertise, has a duty to use
87	those skills or that expertise in managing and investing institutional funds.

Section 3. Appropriation for expenditure or accumulation of endowment fund.

(A) Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

- (1) the duration and preservation of the endowment fund;
- (2) the purposes of the institution and the endowment fund;
- (3) general economic conditions;

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- (4) the possible effect of inflation or deflation;
- 101 (5) the expected total return from income and the appreciation of investments;
- 102 (6) other resources of the institution; and
- 103 (7) the investment policy of the institution.

(B) To limit the authority to appropriate for expenditure or accumulate under subsection(A), a gift instrument must specifically state the limitation.

106	(C) Terms in a gift instrument designating a gift as an endowment, or a direction or
107	authorization in the gift instrument to use only "income", "interest", "dividends", or "rents,
108	issues, or profits", or "to preserve the principal intact", or words of similar import:
109	(1) create an endowment fund of permanent duration unless other language in the
110	gift instrument limits the duration of the fund; and
111	(2) do not, standing alone, limit the authority to appropriate for expenditure or
112	accumulate under subsection (A).
113	Section 4. Delegation of management and investment functions.
114	(A) Subject to any specific limitation set forth in a gift instrument or in law other than
115	this chapter, an institution may delegate to an external agent the management and investment of
116	an institutional fund to the extent that an institution could prudently delegate under the
117	circumstances. An institution shall act in good faith, with the care that an ordinarily prudent
118	person in a like position would exercise under similar circumstances, in:
119	(1) selecting an agent;
120	(2) establishing the scope and terms of the delegation, consistent with the
121	purposes of the institution and the institutional fund; and
122	(3) periodically reviewing the agent's actions in order to monitor the agent's
123	performance and compliance with the scope and terms of the delegation.
124	(B) In performing a delegated function, an agent owes a duty to the institution to exercise
125	reasonable care to comply with the scope and terms of the delegation.

(C) An institution that complies with subsection (A) is not liable for the decisions or actions of an agent to which the function was delegated.

- (D) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.
- (E) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this chapter.
- Section 5. Release or modification of restrictions on management, investment, duration, or purpose.
- (A) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, duration, or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.
- (B) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management, investment, or duration of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The attorney general shall be made a party to any such application and resulting proceeding. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(C) If a particular charitable purpose or a restriction contained in a gift instrument on the
use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful,
the court, upon application of an institution, may modify the purpose of the fund or the
restriction on the use of the fund in a manner consistent with the charitable purposes expressed in
the gift instrument. The attorney general shall be made a party to any such application and
resulting proceeding.

(D) The supreme judicial court may by rule or order provide that any application otherwise subject to court approval pursuant to subsections (B) and (C) above, may be approved by the attorney general if the value of the fund is not greater than such amount as the court may provide or in such other situations as the court may so provide.

Section 6. Reviewing compliance.

Compliance with this chapter is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

Section 7. Application to existing institutional funds.

This chapter applies to institutional funds existing on or established after June 30, 2009. As applied to institutional funds existing on June 30, 2009, this chapter governs only decisions made or actions taken on or after that date.

Section 8. Relation to the electronic signatures in global and national commerce act

This chapter modifies, limits, and supersedes the electronic signatures in global and
national commerce act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede

Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

Section 9. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. To the extent that any provision of the law, rule or regulation is in conflict with this chapter, specifically to the extent that any such conflict would operate to defeat or otherwise interfere with the purposes of this chapter, this chapter shall supersede and take precedence over any such, law, rule or regulation. This act shall be construed to the maximum extent possible so as to not constitute an impairment of contract.